

CHARLES H. MOORE COOLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1944.

No.

220

THE SCOTTISH AMERICAN INVESTMENT COMPANY, LIMITED,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

No.

221

BRITISH ASSETS TRUST, LIMITED,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

No.

222

SECOND BRITISH ASSETS TRUST, LIMITED,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

**Petition for Writs of Certiorari to the United States
Circuit Court of Appeals for the Third Circuit.**

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*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Scottish American Investment Company, Limited,
British Assets Trust, Limited, and Second British Asset
Trust, Limited, pray that writs of certiorari issue to
review the judgments of the Circuit Court of Appeals for

the Third Circuit reversing the decisions of the Board of Tax Appeals (R. 93, 94).

Opinions Below.

The opinion of the Board (R. 77, 92) is reported in 47 B. T. A. 474. The opinion of the Circuit Court of Appeals (R. 135-140) is not yet reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on April 6, 1944 (R. 140-142). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The Question Presented.

Whether the petitioners, foreign corporations, were engaged in trade or business within the United States or had an office or place of business therein in the taxable years 1938 and 1939 and were therefore resident corporations within the meaning of Section 231(b) of the Revenue Act of 1938 and Section 231(b) of the Internal Revenue Code.

Statutes and Regulations Involved.

The applicable provisions of the Revenue Act of 1938, c. 280, 52 Stat. 447; and of the Internal Revenue Code are the same and are as follows:

"SEC. 231. TAX ON FOREIGN CORPORATIONS.

(b) Resident Corporations.—A foreign corporation

engaged in trade or business within the United States or having an office or place of business therein shall be taxable as provided in section 14(c)(1)."

"SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(b) United States Business or Office.— * * * As used in this section, section 119, section 143, section 144 and section 231, the phrase 'engaged in trade or business within the United States' includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate \$3,000. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian."

Treasury Regulations 101, promulgated under the Revenue Act of 1938, and Treasury Regulations 103, promulgated under the Internal Revenue Code, are in all material respects the same and are as follows:

"Sec. 19.231-1. Taxation of foreign corporations.

For the purposes of this section and sections 19.231-2,

* * * foreign corporations are divided into two classes:

- (a) foreign corporations not engaged in trade or business within the United States and not having an office or place of business therein at any time within

the taxable year, referred to in the regulations as non-resident foreign corporation * * *; and (b) foreign corporations which at any time within the taxable year are engaged in trade or business within the United States or have an office or place of business therein, referred to in the regulations as resident foreign corporations * * *.

(b) Resident foreign corporations.—

As used in Sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian.

"Whether a foreign corporation has an office or place of business within the United States depends upon the facts in a particular case. The term office or place of business, however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected."

Statement of the Case.

The petitioners are corporations organized under the laws of Great Britain with their principal offices in Edinburgh, Scotland. Each petitioner is an investment trust and as such engaged in the business of investing its funds for the primary purpose of deriving income from investments (R. 79). Their United States income tax returns for the years 1928 and 1929 were filed with the Collector of Internal Revenue at Newark, New Jersey (R. 79). On

December 2, 1936, at the time they opened their offices in the United States, their investments in United States securities in round figures amounted to (R. 79):

Scottish American Investment Company, Limited	\$24,500,000
British Assets Trust, Limited	15,000,000
Second British Assets Trust, Limited	8,500,000

The above investments represented more than 40% of the total investments of Second British Assets Trust, Limited, more than 30% of the total investments of British Assets Trust, Limited, and more than 40% of the total investments of Scottish American Investment Company, Limited (R. 79).

At the end of 1938 and 1939 the investments of Scottish American Investment Company, Limited (hereinafter called "Scottish"), in United States securities were in round figures \$23,200,000 and \$20,000,000 respectively (R. 6); of British Assets Trust, Limited (hereinafter called "British") \$16,000,000 and \$12,000,000 respectively (R. 13); and of Second British Assets Trust, Limited (hereinafter called "Second British") \$8,300,000 and \$6,000,000 respectively (R. 17).

Dividends collected by the petitioners from United States securities in 1938 and 1939, all of which were collected in the United States office, were as follows (R. 83):

	1938	1939
Scottish	\$730,021.45	\$731,180.92
British	548,923.43	570,355.47
Second British	262,292.80	259,735.11

Each of the petitioners owned a large number of different United States securities during the years involved (R. 79).

Each had a Board of Directors which met frequently at its home office in Edinburgh (R. 79). The home office of Scottish was managed by F. H. N. Walker, Secretary and Manager, and the home office of British and Second British was managed by a firm of secretaries, Messrs. Ivory & Sime. The Chairman of the Board of each petitioner was A. W. Robertson-Durham (R. 31, 80, 125-127).

Prior to 1936 Scottish had realized profits from the sale of securities in the United States but had failed to file Federal income tax returns reporting such profits. The accounting firm of Barrow Wade Guthrie & Co. of New York City was engaged by Scottish to audit its sales of securities in the United States and calculate the profits reportable for United States income tax on such sales. This resulted in a tax liability of more than \$1,000,000 with interest thereon of more than \$220,000 for the years 1927 to 1934, inclusive, which Scottish reported and paid to the United States (R. 80). In 1935 Walker, the Secretary and Manager, was in the United States and then discussed with Walter A. Cooper, member of the firm of Barrow Wade Guthrie & Co., the question of opening an office in the United States for Scottish (R. 80). In September and October 1936 Cooper with Earl Breeding, an employee of Barrow Wade Guthrie & Co., made a trip to England where they visited a number of their firm's clients. They discussed with petitioners the matter of opening an office in the United States, including the ways in which such an office would be of assistance to petitioners in their business transactions in the United States and the effect of it from the viewpoint of taxation under the then recently enacted Revenue Act of 1936 (R. 80, 81). Cooper and Breeding left England in November 1936 without any decision having been made. But on December 2, 1936, each petitioner appointed Cooper its Assistant Secretary and on that

date cabled the action to Cooper. The cable was followed by letters dated December 2, 1936, in the case of British and Second British and December 3 in the case of Scottish, informing him of his appointment and confirming instructions to him to proceed with the opening of an office in the United States (R. 81).

Immediately upon receipt of the cables Cooper rented office space consisting of two rooms in the Equitable Building at 120 Broadway, New York, New York, on the floor below the floor occupied by the offices of Barrow Wade Guthrie & Co. Designated space in the two rooms was leased to each petitioner for a specified rental per year (R. 81). In 1938 petitioners moved their offices to 26 Journal Square, Jersey City, New Jersey, where one large room was rented and a part of it partitioned off for a private office. The New York office was connected by a trunk line with the office of Barrow Wade Guthrie & Co. The New Jersey office was also connected by a trunk line with the office of Barrow Wade Guthrie & Co. and in addition it had an outside telephone with a Jersey City number. State tax returns were filed in New York and the petitioners qualified to do business in the State of New Jersey (R. 84, 85).

Prior to the opening of the United States office the petitioners kept their securities in custody accounts with J. P. Morgan & Co. and National City Bank. Securities so kept in custody by the banks were not registered in the names of the petitioners but in the names of nominees of the banks in whose names were also registered securities of other customers of the banks. Dividends received by the nominees were distributed by the banks to the accounts of their various customers (R. 81, 82).

After the office was opened Cooper arranged with the banks to designate nominees for each of the petitioners and to transfer to such nominees the securities belonging

to each of the petitioners so that each nominee would have registered in his name only the securities of the petitioner for whom he acted as nominee (R. 82). These nominees then filed dividend orders or mandates with the many corporations whose securities were registered in their names directing the payment of all future dividends to the respective petitioners at their New York office and later at their Jersey City office. They also directed that annual reports, statements and notices of the issuing corporations be sent to the petitioners at the aforesaid offices (R. 82).

Cooper then caused to be set up and established a complete system of accounts for each of the petitioners and for this purpose obtained the services of a number of the employees of Barrow Wade Guthrie & Co. The first records were made on temporary sheets which were later written in final form in the permanent books of account (R. 82, 83). Cooper continued to serve as Assistant Secretary of each of the petitioners during the years involved. At his suggestion, because of the need for prolonged absence from New York, Breeding was also appointed an Assistant Secretary of each petitioner in June 1937 (R. 83, 86). Cooper was authorized by each petitioner to look after its interests in the United States and was specifically authorized as a matter of special routine to perform the following duties:

1. Collect interest and dividends and deposit the same in the petitioners' bank accounts.
2. Pay all local expenses.
3. Maintain records of all United States transactions.
4. Make periodic reports (usually once a week) by cable or letter on economic, political or other developments in the United States.

5. Complete and file Federal income and capital stock tax returns (R. 84).

He had authority to draw on his sole signature from the bank accounts in the United States of each petitioner up to \$5,000 in any one calendar month and up to any amount with the countersignature of a director. This authority of Cooper over the petitioners' funds in the United States was as great as the authority of any other director or officer in the main office (R. 84). Breeding was not at first given authority to draw checks and make disbursements for the account of Scottish, but later this was changed to give him such authority, and thus he had the same authority as Cooper (R. 123-124). The Assistant Secretaries in the United States also had specific authority to direct the nominees to sign proxies, to direct the disposition of stock rights and scrip, and to direct the custodian banks as to which certificates should be delivered to complete sales of securities ordered by the home office. They had this authority without consultation with the home office (R. 86).

As of December 1st each year a statement of income and disbursements was sent to Edinburgh, which statement was later brought up to date at the end of the year by cable so that the petitioners could close their accounts for the calendar year promptly (R. 85). Periodically the United States office forwarded reports concerning investments, developments in the United States, and statistical data issued by the Federal Reserve Bank and the New York Times (R. 85, 86). The United States office investigated reorganization plans of corporations in whose securities petitioners had invested, and made recommendations as to what if any action should be taken by petitioners as shareholders in corporations undergoing reorganizations (R. 86).

The expenses of the New York office for each of the petitioners were as follows:

	1938	1939
Scottish	\$9,391.36	\$7,728.39
British	6,060.72	6,193.82
Second British	2,799.48	2,563.51

The arrangement of Cooper with the home office was to receive compensation sufficient to pay the expenses of the United States office plus a salary to himself. Salary checks to Cooper were first paid by checks from Edinburgh but later Cooper drew checks to himself for his salary. His salary from British and Second British was paid throughout by checks drawn by Cooper payable to himself. Other expenses were paid by Cooper in the case of all petitioners at all times by checks drawn on petitioners' bank accounts in the United States. An arrangement whereby a secretary or firm of secretaries receives compensation, including the expense of maintaining an office of the company, is a usual one among British investment trust companies (R. 120-122). In fact, Scottish is one of the few British investment trusts that does not operate its home office in conjunction with other investment trusts using the same secretaries and staff (R. 121, 122).

The office work of the petitioners occupied the time of at least two full time employees and part time of additional persons (R. 4, 114). In 1938 and 1939 Henry A. Jeffers, an employee of Barrow Wade Guthrie & Co., was assigned to supervise the office work done by the full time and part time employees on behalf of the Assistant Secretaries and in turn under their supervision. He spent a total of 1,038 1/2 hours in this work during the period February 28, 1938, to December 31, 1939 (R. 4, 113, 114). Each petitioner maintained in the United States office a general ledger.

a security ledger, a general journal, and a cash book. Each also maintained office debit and credit vouchers on which were recorded all sales and purchases of securities and disbursements of every character. The books and records kept in the United States constituted full and adequate records of petitioners' security transactions and receipts of income and disbursements in the United States (R. 85).

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals for the Third Circuit erred in holding that the petitioners were not engaged in trade or business in the United States in 1938 and 1939 within the meaning of the statute and regulations.
2. The said Court erred in holding that the petitioners did not have an office or place of business in the United States in 1938 and 1939 within the meaning of the statute and regulations.
3. The said Court exceeded its appellate authority and erred in holding that the only real business of the corporations consisted of the purchase and sale of securities, a conclusion of fact contrary to the evidence and contrary to the conclusion of the Board of Tax Appeals that the collection at its office in the United States of income from many different sources and the numerous other activities of the petitioners in the United States constituted a very large part of the affairs of petitioners in the United States and the transaction of business.
4. The said Court erred in reversing the decisions of the Board of Tax Appeals.

Reasons for Granting the Writs.

On November 9, 1943, the Circuit Court of Appeals for the Fourth Circuit decided the same question involving the same petitioners and substantially the same facts for the years 1936 and 1937 favorably to the petitioners, *Deering v. Scottish American Ins. Co. Limited, Second British Assets Trust Limited and British Assets Trust Limited*, 139 F. (2d) 419. A petition for certiorari to the Circuit Court of Appeals for the Fourth Circuit was filed by the Solicitor General on behalf of the Commissioner of Internal Revenue on April 8, 1944, and was granted May 29, 1944 (Nos. 869, 870, 871). The decision of the Circuit Court of Appeals for the Third Circuit in the cases here involved is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit now pending on writs of certiorari in this Court.

The Circuit Court of Appeals for the Third Circuit exercised its appellate function contrary to the principles decided by the Supreme Court in *Helvering v. National Grocery Co.*, 304 U. S. 282 (1938); *Dobson v. Commissioner*, 320 U. S. 489 (1943), and *National Labor Relations Board v. Hearst Publications, Incorporated, et al.*, decided April 23, 1944.

Conclusion.

For the reasons set forth above this petition for writs of certiorari should be granted.

Respectfully submitted,

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